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Docket No. 90-38

In The

Supreme Court of the United States

OCTOBER TERM 1990

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS,
Petitioners,

v.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; DONALD VENHAUS, COUNTY JUDGE, PULASKI COUNTY, ARKANSAS; PATRICIA TEDFORD, TREASURER, PULASKI COUNTY, ARKANSAS; PULASKI COUNTY, ARKANSAS; JOANN BOONE, TREASURER, CITY OF BENTON, ARKANSAS; THE CITY OF BENTON, ARKANSAS; AND ALL OTHER SIMILARLY SITUATED COUNTIES AND CITIES,
Respondents,

CITY OF FAYETTEVILLE, ARKANSAS,
Intervenor.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF OF INDIANA CABLE TELEVISION ASSOCIATION INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Indiana Cable Television Association Inc. ("ICTA") is a not-for-profit trade organization composed of approximately 87 cable operators providing cable television services within the State of Indiana. Like their counterparts comprising the Petitioner, Arkansas Cable Television Association, Inc., Indiana cable operators are subject to a discriminatory state excise tax structure (as well as a discriminatory gross income tax scheme).

Such discriminatory tax structures have been implemented with increasing frequency across the nation as state and local governments, especially in light of cutbacks in federal spending, attempt to impose additional taxes upon the rapidly multiplying pool of cable television revenues. In 1976, revenue garnered by cable systems totalled $976 million. By 1989, that amount had skyrocketed to almost $16 billion[1]. Consequently, a single additional excise tax on cable services can produce a huge windfall of tax revenue for states and municipalities with little adverse political fallout from constituents.

The Indiana taxing scheme imposes two forms of discriminatory taxation against cable operators. The Indiana Gross Retail Tax Act[2] imposes an excise tax on all sales of cable television services within the State of Indiana at a rate of 5% while the advertising sales of radio and television broadcasters, being the principal revenue source for the broadcast media, are not deemed to constitute retail sales. Furthermore, newspapers, although involved in the retail transfer of tangible personal property, are specifically exempted from sales tax. The Indiana Gross Income Tax Act[3] subjects Indiana cable operators to a gross income tax of 1.2% of revenues, while radio and television broadcasters, newspapers and other communications media such as display advertising are subjected to a rate of only 0.3%. The combined effect of this discriminatory Indiana state tax treatment is to tax cable operators at a cumulative rate of 6.2% of gross receipts while revenues of radio and television broadcasters and newspapers are taxed at only 0.3% of gross receipts.

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[1] NATIONAL CABLE TELEVISION ASSOCIATION, CABLE TELEVISION DEVELOPMENTS, October 1990, at 8-A.

[2] IND. CODE ANN. §§ 6-2.5-1-1 to 6-2.5-10-4 (West 1990) (relevant excerpts of the Indiana Gross Retail Tax Act are contained in Appendix Exhibit 1).

[3] IND. CODE ANN. §§ 6-2.1-1-1 to 6-2.1-8-10 (West 1990) (relevant excerpts of the Indiana Gross Income Tax Act are contained in Appendix Exhibit 2).

By singling out cable television operators from other similarly situated First Amendment publishers, discriminatory state tax structures not only impose a greater burden on cable operators, but in fact serve to suppress the delivery of ideas, symbolic speech, news, depiction of government activities, forms of entertainment and other means of expression and information commonly disseminated through cable television. There is no compelling state interest to support taxing cable system operators while not taxing other First Amendment publishers such as radio and television broadcasters and newspapers disseminating the same or substantially the same information. **To do so is to suppress speech merely because of the medium employed.**

Because the Indiana tax structure discriminates against cable operators vis-à-vis other similarly situated First Amendment publishers such as radio and television broadcasters and newspapers, Amicus is interested in and supports Petitioners. The constitutionality of Arkansas' tax structure which similarly singles out and discriminates against cable operators will have a significant precedential effect on the rights of cable operators in Indiana.[4]

[4] Indeed, many other states impose a discriminatory excise and/or income tax on cable operators. *See, e.g.*, Mich. Comp. Laws §§ 205.51 - .78, .91 - .111 (1990) (Michigan General Sales Tax and Michigan Use Tax Act specifically exempt radio and television broadcasters, but not cable operators).

ARGUMENT

A. CABLE OPERATORS ARE ENTITLED TO FIRST AMENDMENT PROTECTION.

Like other communications media, this Court has repeatedly held that First Amendment protections extend to cable television.[5] Most recently, this Court affirmed in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), that cable television enjoys First Amendment rights, noting that:

> We do think that the activities in which [Preferred] allegedly seeks to engage plainly implicate First Amendment interests. . . . Thus, through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [Preferred] seeks to communicate messages on a wide variety of topics and in a wide variety of formats. We recently noted that cable operators exercise "a significant amount of editorial discretion regarding what their programming will include." . . . Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers and pamphleteers.

Id. at 494 (citation omitted).

This conclusion by the Court is consistent with numerous other decisions of the Court which extend First Amendment protections to various types of speech and conduct regardless of the medium employed. *See, e.g., Texas v. Johnson*, 341 U.S. _____; 105 L.Ed.2d 342 (1989) (flag burning); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (nude dancing); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976) (movies); *Schacht v. United States*, 398 U.S. 58 (1970) (theater); *Butler v. Michigan*, 352 U.S. 380 (1957) (books); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (newspapers and magazines). The First Amendment rights of cable operators are of no less significance than the

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[5] *See, e.g., Federal Communications Commission v. Midwest Video Corp.*, 440 U.S. 689 (1979).

rights of other First Amendment publishers merely because the medium employed to disseminate information is coaxial or fiber optic cable.

B. DISCRIMINATORY TAXATION AMONG FIRST AMENDMENT PUBLISHERS IS PROHIBITED.

For tax purposes, cable television operators are similarly situated with other First Amendment "publishers" — newspapers, broadcasters, wireless television and radio operators. Arkansas, like Indiana, taxes cable operators at a higher rate than it taxes other "publishers." Such discriminatory taxation must be justified by a compelling state interest. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). In this case, Arkansas has no compelling state interest. Therefore, its discriminatory tax is unconstitutional. [6]

1. The Relevant Class in which Disparate Treatment is Analyzed is "Publishers" which Includes Newspapers, Magazines, Television Broadcasters, Radio Broadcasters, Cable Television Operators and Other Providers of Video Programming Services.

Similarly situated First Amendment publishers cannot be taxed in a discriminatory fashion. *Minneapolis Star* at 585. This Court has struck down disparate state tax schemes involving publishers using the identical media. *See, e.g., Minneapolis Star* (newspapers v. newspapers) and *Arkansas Writers' Project* (magazines v. magazines).

Earlier this year, three state courts analyzed Arkansas-like discriminatory tax schemes involving different media and held such discrimination violates the publishers' First Amendment rights. The state courts' rationale is persuasive.

In *Newsweek, Inc. v. Celauro*, 789 S.W.2d 247 (Tenn. 1990), the

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[6] Respondents deny cable operators are First Amendment "press," because cable operators do not use newsprint or wireless broadcasts, despite the fact that each medium transmits often identical messages and information. *See Respondents' Brief in Opposition to Petition for Writ of Certiorari*, Case No. 90-38 at 4, 10. Thus, Respondents claim they need show only a rational basis for their discrimination. Even if the rational basis test is applied, Petitioner prevails. *See, infra*, at § B(3).

Tennessee Supreme Court struck down the Tennessee sales tax scheme which exempted mail order sales of subscriptions to newspapers from sales tax but taxed mail order sales of magazine subscriptions. The Tennessee court made two important determinations in applying this Court's *Minneapolis Star* holding. First, it held that even if a tax is of general applicability, such as a sales tax, the state must still show a compelling state interest if such a tax either singles out press or targets individual publications within the press. Second, in defining the class of publishers among which discriminatory taxation was to be evaluated, the court included two different media (magazines and newspapers).

In *Oklahoma Broadcasters Association v. Oklahoma Tax Commission*, 789 P. 2d 1312 (Okla. 1990), the Oklahoma Supreme Court went one step further and compared discriminatory taxation between broadcasters and the newsprint media. The court struck down a state sales tax scheme which imposed sales tax on the sale of advertising by television and radio broadcasters, but exempted from sales tax such sales by newspapers and magazines. In reaching its holding, the court determined that "radio, television and print media were all the same trade or profession, i.e. 'publishing' industry." *Id.* at 1315. Since both broadcasters and members of the print media were held to be members of the "press," the court found that the "First Amendment guarantees freedom of the press — not just the *printed* press." *Id.* at 1316.

Like the *Newsweek* court, the Oklahoma court applied *Arkansas Writers' Project* which prohibits a state from imposing a tax that either singles out the press or targets some but not all publishers or publications, absent a compelling reason for differential treatment. Additionally, the court dismissed the state's contention that broadcasters were subject to greater regulation because of the scarcity of the electromagnetic broadcast spectrum. The court held that the existence of technological scarcity of the airwaves has absolutely no connection with the ability of a state to tax the activities of broadcasters:

> Appellant Tax Commission's argument in response to the trial court's ruling is that this result is permissible because the broadcasting media has been subject to a higher degree of regulation than printed materials. We find no merit to this argument. The cases cited to by Appellant Tax Commission

> deal with *regulation* of the broadcast industry in that broadcast wavelengths represent a limited resource .... No analogy can be drawn to the present challenge.

Id. at 1317 (citations omitted).

In determining that discriminatory taxation of members of the press violated the First Amendment and Fourteenth Amendment equal protection rights of broadcasters, the Oklahoma Supreme Court found it unnecessary to define the extent of the First Amendment protections of broadcasters or their relative position vis-à-vis the First Amendment rights of the printed press.

In *Suburban Cable TV Co., Inc. v. Commonwealth of Pennsylvania*, 131 Pa. Commw. 368; 570 A.2d 601 (1990), the Commonwealth Court of Pennsylvania struck down the imposition of a Pennsylvania capital stock tax on cable television operators where publishers of books, newspapers, magazines or other periodicals and broadcasters of radio and television programs were exempt. The court recognized that the publishing industry included cable television operators, broadcasters and the print media. Furthermore, when comparing cable television operators and broadcasters, the court held that there was no rational relationship between the identity of the authorizing government (federal for broadcasters and municipal for cable operators) upon which disparate tax treatment could be premised. According to the *Suburban Cable TV* court:

> Why should information-transmitting media be encouraged and fostered by tax exemption when the governmental authority for this existence is a federal agency; while other information-transmitting media, disseminating the same sources of information and more besides, are denied exemption because the authorizing government is primarily local government and only incidentally federal government?

Id. at 386.

As these state courts have determined, for purposes of First Amendment taxation analysis, the relevant class is "publishers." All

members of the print and electronic media are publishers. Just as newspapers or magazines originate material (write original articles), edit material (select which articles to publish from original or other sources) and publish material, so do cable operators and broadcasters. Cable operators provide some original programming, edit (determine which programs to carry from a wide variety of program suppliers) and publish (sending of the signal over the cable distribution system). *See Midwest Video.* Since the appropriate class is publishers, when this Court analyzes the validity of the Arkansas taxing scheme on First Amendment grounds, the relevant analysis is the taxation of cable operators compared to broadcasters, newspapers and magazines.

2. Discriminatory Taxation Among First Amendment Speakers Can Only be Justified by a Compelling Governmental Interest.

First Amendment rights are by no means unlimited. This Court has long held that government can impose reasonable regulations on those persons exercising First Amendment rights. However, once a law has the effect of treating press providers differently, the Court must strictly scrutinize the law. As this Court noted in *Minneapolis Star:*

> Further, differential treatment, unless justified by some special characteristics of the press, suggests the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional.

460 U.S. at 585.

To overcome the presumption of invalidity, a state tax regulation that discriminates among the press must advance a *compelling* governmental interest:

> Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of a *compelling importance*, that it cannot achieve without differential taxation.

Id. at 585 (emphasis added).

In *Minneapolis Star*, this Court struck down a state use tax as violative of the First Amendment because it discriminated among members of the printed press. The heavy burden that a state must meet to survive this Court's strict scrutiny of a discriminatory governmental tax or regulation cannot be over emphasized:

> A tax that singles out the press, or that targets individual publications within the press places a heavy burden on the state to justify its action.

460 U.S. at 592-593.

Four years after *Minneapolis Star*, this Court in *Arkansas Writers' Project* reiterated the heightened scrutiny that must be applied when a government regulation discriminates among members of the "press:"

> Arkansas faces a heavy burden in attempting to defend the content based approach to taxation. In order to justify such differential taxation, the State must show its regulation is *necessary* to serve a *compelling* state interest and is narrowly drawn to achieve that end.

481 U.S. at 231 (emphasis added).

When held up to the strict scrutiny standard of review enunciated by this Court in *Minneapolis Star* and *Arkansas Writers' Project*, courts that have reviewed state tax schemes that discriminate among members of the press have held that the states failed to show a compelling governmental interest to warrant the discriminatory treatment. *See Oklahoma Broadcasters* (no compelling reason found for imposing differential tax burden on print media and broadcast media); *Newsweek*, (no compelling state interest furthered by imposing differential tax on mail order sales of newspaper subscriptions and mail order sales of magazine subscriptions); *Satellink of Chicago, Inc. v. City of Chicago*, 168 Ill. App. 3d 689, 523 N.E.2d 13 (1988) (city could not show a compelling state interest to justify imposing an amusement tax on subscription television but not franchised cable television). The First Amendment rights of cable operators encompass both the protections of freedom of speech and freedom of

press. *See, e.g., City of Alameda v. Premier Communications Network, Inc.*, 156 Cal. App. 3d 148; 202 Cal. Rpts. 684 (1984), *cert. denied*, 496 U.S. 1073 (1984) (a subscription television service which provided the Home Box Office service was a disseminator of motion pictures, news, and other information and entertainment programming, and therefore was entitled to guarantees of freedom of speech and press).

3. The Arkansas Tax Discriminates Against Cable Television Operators.

The Arkansas taxing scheme subjects the subscriber revenues of cable operators to a 3% tax on gross receipts. *See* ARK. STAT. ANN., § 26-52-301(3)(D)(i) (1990). The 3% tax is not imposed on either the revenue stream created by advertising of broadcasters, newspapers or magazines, nor upon that created by the sale of newspapers. *See* ARK. STAT. ANN., §§ 26-52-401(5), (14) (1990).

The Arkansas tax singles out one element of the "press" i.e., cable television companies, including satellite transmission operators, for the payment of taxes that no other enterprise engaged in the dissemination of opinion, ideas or entertainment is required to pay.

There is little discernable difference to the viewer of a broadcast television program and a cable television program. Indeed, much cable television programming is broadcast television.

There is no principled or reasoned distinction between cable operators, including satellite operators, and other journalists that justifies taxing cable operators at a discriminatory rate. The fact that many cable operators use public rights-of-way is no justification at all and the Arkansas Supreme Court properly rejected the Respondents' claim in this action that its discriminatory tax should be upheld because some cable operators used public rights-of-way. See *Medlock v. Pledger*, 301 Ark. 483; 785 S.W.2d 202 (1990). The Arkansas tax applies equally to cable television operators using public rights of way and satellite operators who use no rights-of-way at all. Indeed, the Arkansas court's decision regarding the validity of the tax was expressly conditioned upon the inclusion of satellite operators within the taxing scheme.

The State of Arkansas has simply not produced a compelling state

interest to justify the discriminatory taxation of cable operators vis-à-vis broadcasters or newspapers.

Even if the challenged statute is subject to rational basis analysis, it fails the test. Under the rational basis standard, entirely exempting newspapers, radio, wireless television, and magazines from taxes which are imposed on cable operators must rationally further a reasonable purpose identified by the state. *See Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). Respondents argue discriminatory taxation is rationally related to some state interest in "use of public ways" and "public order:"

> The same facts which render cable television completely dissimilar to all other media provide more than sufficient support for subjecting sales of cable television service to the general sales tax. Cable's use of public ways and disruption of public order place it in a different class for both First Amendment and equal protection considerations.

Respondents' Brief in Opposition to Petition for Writ of Certiorari, Case No. 90-38 at 10.

Respondents' claims are unavailing. In fact, the Arkansas Supreme Court held that Respondents' asserted interest has no rational connection to discriminatory taxation:

> In his order ruling against the taxpayers, the chancellor distinguished the cable medium from others on the ground that it required use of a public right of way in addition to the fact that there are no gross proceeds to be taxed in the case of, for example, broadcast television. There was uncontradicted testimony to the effect that a cable television enterprise pays a franchise fee for the use of the right of way. It is true that the use of public rights of way by cable television may subject it to more regulation as has been suggested in some cases. . . . However, those cases involve regulation related to access to or use of the rights of way rather than a tax which has no relationship to the acquisition of the privilege of using public

> property. We thus find the fact that cable television uses public property and must obtain a franchise to do so should not control the result in this case.

Medlock, 785 S.W.2d at 203 (citation omitted).

Even assuming Respondents' assertion that "cable's use of public ways and disruption of public order place it in a different class," Respondents must show some rational basis for the discrimination. This, they cannot do.

SUMMARY OF ARGUMENT

Cable operators are First Amendment speakers and are similarly situated with radio and television broadcasters, newspapers and magazines. All members of the print, electronic and cable television media engage in the common activities of originating speech, editing speech and publishing speech. Hence they are all "publishers."

To be valid, a state taxing scheme may not impose disparate burdens among similarly situated First Amendment speakers absent a compelling state interest. Consequently, a tax such as the Arkansas tax, which burdens cable operators to a greater extent than other publishers without the existence of a compelling state interest, is violative of the First Amendment protections of cable operators and must be struck down by this Court.

CONCLUSION

Like newspapers, broadcast television, and other members of the publishing press, cable operators have First Amendment protection.

The First Amendment stands as a guard against government taxation which is applied differently to otherwise similarly situated publishers based solely on the medium by which information is disseminated.

As are broadcasters and members of the print media, cable operators are First Amendment publishers. **Whether or not the First Amendment rights of cable operators are comparable to those of the print media or broadcast media need not be resolved by the Court in this case.** A state tax that discriminates in its treatment among First Amendment

publishers must be evaluated under this Court's strict scrutiny standard of review. The imposition of a discriminatory tax that treats cable operators differently than other First Amendment publishers can only be justified if the state demonstrates a compelling governmental interest.

Under the Arkansas tax scheme, how a First Amendment publisher disseminates information -- the medium employed -- is the sole factor for determining the publisher's tax liability. Cable operators and other providers of video and audio programming services are singled out for a special 3% tax merely because these publishers receive their revenue directly from subscribers. Broadcasters, newspapers, and magazines are not subjected to the same 3% tax. No compelling governmental interest can be or has been asserted by Arkansas for this discriminatory tax treatment. Furthermore, the discriminatory tax statute is not even rationally related to a legitimate governmental interest.

The State of Arkansas Act 188 of 1987, as amended by Act 769 of 1989, violates the First Amendment rights of cable operators. Therefore, the judgment of the Arkansas Supreme Court should be reversed by this Court.

Respectfully submitted,

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November 15, 1990

APPENDIX TO AMICUS CURIAE BRIEF OF INDIANA CABLE TELEVISION ASSOCIATION INC.

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Exhibit 1 – Excerpts of the Indiana Gross Income Tax Act

ARTICLE 2.5
STATE GROSS RETAIL AND USE TAXES

6-2.5-1-2 "Retail transaction" and "retail unitary transaction"

Sec. 2. (a) "Retail transaction" means a transaction of a retail merchant that constitutes selling at retail as described in IC 6-2.5-4-1, that constitutes making a wholesale sale as described in IC 6-2.5-4-2, or that is described in any other section of IC 6-2.5-4 . . . .

6-2.5-1-5 "Gross retail income"

Sec. 5. (a) "Gross retail income" means the total gross receipts, of any kind of character, received in a retail transaction, except that part of the gross receipts attributable to:

(1) the value of any tangible personal property received in a like kind exchange in the retail transaction; or

(2) the receipts received in a retail transaction which constitute interest, finance charges, or insurance premiums on either a promissory note or an installment sales contract . . . .

6-2.5-1-8 "Retail merchant"

Sec. 8 "Retail merchant" means a person who is described as a retail merchant in IC 6-2.5-4 or who is required to hold a retail merchant's certificate under IC 6-2.5-8.

6-2.5-2-1 Imposition; liability; payment; collection

Sec. 1. (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana . . . .

6-2.5-4-1 Selling at retail

Sec. 1. (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.

(b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:

(1) acquires tangible personal property for the purpose of resale; and

(2) transfers that property to another person for consideration . . . .

6-2.5-4-11 Cable television service

Sec. 11. (a) A person is a retail merchant making a retail transaction when he furnishes local cable television service or intrastate cable television service.

(b) Notwithstanding subsection (a), a person is not a retail merchant making a retail transaction when the person provides, installs, constructs, services, or removes tangible personal property which is used in connection with the furnishing of local cable television service or instrastate cable television service.

6-2.5-5-17 Newspapers

Sec. 17. Sales of newspapers are exempt from the state gross retail tax.

Exhibit 2 – Excerpts of the Indiana Gross Income Tax Act

ARTICLE 2.1
GROSS INCOME TAX

6-2.1-1-2 "Gross income"; inclusions; exclusions; "exchange"; "like kind"

Sec. 2. (a) Except as expressly provided in this article, "gross income" means all the gross receipts a taxpayer receives;

(1) from trades, businesses, or commerce; . . .

6-2.1-1-12 "Retail merchant"

Sec. 12. "Retail merchant" means a taxpayer who is regularly and occupationally engaged in the business of purchasing tangible personal property and providing the tangible personal property to his customers at a fixed and established place of business. For purposes of this section, the property may be sold as purchased, after modification, or in conjunction with the rendition of personal services.

6-2.1-2-1 Definitions

Sec. 1. As used in this chapter: . . .

(b)(1) "Selling at retail" means a transaction in which a retail merchant in the ordinary course of his regularly conducted business transfers the ownership of tangible personal property to another, conditionally or otherwise, for a consideration if:

(A) the retail merchant had previously acquired that tangible personal property for the purpose of reselling it; and

(B) the transferee acquiring the property does not acquire the tangible personal property for the purpose of making a wholesale sale. . . .

6-2.1-2-2 Gross income tax imposed; determination of tax rate

Sec. 2. (a) An income tax, known as the gross income tax, is imposed upon the receipt of:

(1) the entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana; and

(2) the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana.

6-2.1-2-3 Rates of tax

Sec. 3. (a) The receipt of gross income from transactions described in section 4 of this chapter is subject to a tax rate of three-tenths of one percent (0.3%).

(b) The receipt of gross income from transactions described in section 5 of this chapter is subject to a tax rate of one and two-tenths percent (1.2%).

6-2.1-2-4 Rate of tax; income derived from certain business transactions

Sec. 4. The receipt of gross income from the following is subject to the rate of tax prescribed in section 3(a) of this chapter:

(1) wholesale sales;

(2) *display advertising, including outdoor painted and poster display advertising and radio and television media advertising,* but not including any sale or rental of tangible property or any personal professional service rendered in connection with such advertising; . . .

(Emphasis added)

6-2.1-2-5 Rate of tax; income derived from certain utility transactions; activities taxable on gross earnings basis; other business activities

Sec. 5. The receipt of gross income from the following is subject to the rate of taxation prescribed in section 3(b) of this chapter: . . .

(7) operating any other utility which is not described in this section; . . .

(9) any activity which is not described in section 4 of this chapter, including the *provision of services* of any character, sales of real estate, rentals (except rentals described in section 4(6) of this chapter), the performance of contracts, and the investment of capital. . . .

(Emphasis added)

6-2.1-2-6 Rate of tax; income derived from certain wholesale and utility transactions

Sec. 6. The receipt of gross income from a transaction described in both sections 4(1) and 5(1) through (7) of this chapter is subject to the tax rate fixed in section 3(b) of this chapter.